

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

COMMUNITY HEALTH CENTER LA CLINICA
Employer

and

19-RC-14606

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 8, AFL-CIO
Petitioner

ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

On January 14, 2005, the Acting Regional Director for Region 19 issued a Report and Recommendation on Objections and Direction of Hearing in the captioned matter and finding that the objections raised substantial and material issues of fact that could best be resolved by a hearing, ordered that a hearing be conducted before an administrative law judge.

The hearing was held on January 24 and 25, 2005, in Pasco, Washington. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses and to introduce relevant evidence. Since the close of hearing, briefs have been received from the Employer and Petitioner. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

1. Procedural History

Pursuant to a Stipulated Election Agreement that the Regional Director approved on November 15, 2004, an election by secret ballot was conducted by the Regional Director of Region 19 (Region) of the National Labor Relations Board (Board) on December 9, 2004 in two appropriate collective bargaining units, Voting Group A (a group of professional employees), and Voting Group B (a group of non-professional employees).

The Region served the Tally of Ballots upon the parties at the conclusion of the election which shows:

Voting Group A (Question No. 1)

Approximate number of eligible voters	26
Void ballots	0
Votes cast for inclusion in the same unite as Voting Group B	17
Votes cast against inclusion	3
Valid votes counted	20
Challenged ballots	2
Valid votes counted plus challenged ballots	22

Voting Group A and B (Representation Question)

	Approximate number of eligible voters	195
5	Void ballots	0
	Votes cast for Petitioner	86
	Votes cast against participating labor organization.	66
	Valid votes counted	152
	Challenged ballots	9
10	Valid votes counted plus challenged ballots	161

The challenged ballots were insufficient in number to affect the results of the election.

On December 16, 2004, the Employer filed timely objections to conduct affecting the results of the election.

2. The Objections

The Employer filed three objections which state:

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1. Objection No. 1. On two occasions during the time that the polls were open in this election, the NLRB agent conducting the election left the polling area and took the unsealed ballot box and the blank ballots with him. On both occasions, the two observers remained in the polling place and were not able to observe the Board agent or the ballot box for several minutes.

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2. Objection No. 2. Some voters were not permitted to mark their ballots with a pen. They were told by the Board Agent to use a pencil.

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3. Objection No. 3. During the polling time, a representative of the Petitioner engaged in electioneering with employees waiting to vote.

Employer's Objection No. 1

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The record reflects that an election among the Employer's employees was conducted on December 9, 2004, at two locations. The first session took place from 10:00 a.m. to 11:00 p.m. at the Employer's Kennewick, Washington clinic. The second session was conducted from 12:00 p.m. to 3:00 p.m. at the Employer's Pasco facility.

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The facts are not in dispute concerning Employer's Objection No. 1. During the course of the second election session, Board agent Richard Fiol (Fiol) left the polling place on three occasions while the polls were open.

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On the first occasion at about 2:00 p.m., Fiol took a brief restroom break. At the time of the break there were no employees waiting to vote. Fiol advised the two observers that the polls would be temporarily closed and to tell any voters who came to the polls to wait. The observers remained at the polling place. Fiol took both the unsealed ballot box and unmarked ballots with him. He was gone for about two minutes. When Fiol returned neither of the observers advised that any voters had come to the polls.

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At about 2:45 p.m., Fiol left the polls to go to his car to retrieve a legal pad for the vote count. There were no voters waiting to vote. Again Fiol told the observers to tell any voters

who came to vote that they should wait. Fiol again took the unsealed ballot box and unmarked ballots with him. The observers remained at the polling place and when Fiol returned in about one minute the observers did not say any voters had come to vote.

5 During the second voting session in Pasco employee Ramona Castro (Castro) on several occasions interrupted Fiol to ask him questions about voting procedure. Castro wanted to know why two voting booths were being used, why different colored ballots were available and why employees had to use pencils to mark their ballots. Concerned about leaving the polling place while voters were present, Fiol asked Castro to wait. Finally to avoid further
10 disruption, Fiol asked voters to wait outside the polling place. Fiol took Castro aside a few feet outside the polling place where he could observe the unmarked ballots, the ballot box and the observers and briefly addressed her concerns. The tally of ballots reflects no discrepancy between the number of voters and the number of votes cast.

15 The Board has held that it will uphold challenges to the integrity of the election process only where there is “a reasonable doubt as to the fairness and validity of the election.” *Sawyer Lumber Co.*, 326 NLRB 1331 (1998). Only where the Board agent has left the ballot box or unmarked ballots wholly unattended has it set aside an election. *Austill Waxed Paper Co.*, 169 NLRB 1109 (1968). In *Sawyer Lumber, supra*, the Board refused to set an election aside
20 where the Board agent or the observers were always present with the ballot box and the Board agent at all times was in possession of the unmarked ballots.

In this case Fiol always maintained possession of both the ballot box and the unmarked ballots when he was out of the polling place. On the occasion when he spoke with Castro in the
25 hall outside the polling place he was able to observe both the ballot box and unmarked ballots. Moreover, in view of the consistency between the number of employees voting and the number of ballots counted, I find there is no reasonable doubt as to the fairness and validity of the election. Accordingly, I recommend Employer’s Objection 1 be overruled.

30 *Employer’s Objection No. 2*

Once again the facts concerning the Employer’s second Objection are not in dispute. At each voting session Fiol made pencils available in the voting booths for voters to mark their ballots. During the first session at the Kennewick site an employee asked Fiol if they could use
35 a pen to mark the ballot. Fiol replied that pencils were being used. There is no dispute that during the second voting session, Fiol allowed employees to use pens to mark their ballots. However, there is no evidence that anyone could tell whether employees used pen or pencil to mark their ballots since the voters were obscured by the polling booth.

40 The Board and Courts have refused to set an election aside where eraserless pencils were used to vote. *Elizabethtown Gas Co. v. NLRB*, 212 F. 3d 257 (4th Cir. 2000) enforcing *Elizabethtown Gas Co.*, 328 NLRB No. 32 (1999). An election will not be set aside unless the writing instrument inherently identifies the voter. *Bridgeton Transit*, 124 NLRB 1047 (1959). In the instant case no one was able to identify if anyone used a pen or a pencil because no one
45 could observe the employee voting. I find that the use of pens or pencils in the two voting sessions did not identify any voters. Thus, no reasonable doubt has been established as to the fairness or validity of the election. *Elizabethtown Gas Co. v. NLRB, supra*. I recommend that Employer’s Objection 2 be overruled.

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Employer's Objection No. 3

Castro alleges that during the second voting session at the Pasco facility she saw
 Petitioner's Organizing Director Cynthia Schu (Schu) between 12:30 p.m. and 1:30 p.m. very
 briefly talk to voters waiting in line to vote. Castro did not hear what was said. Again between
 1:30 p.m. and 2:00 p.m. at the Pasco facility Castro claims to have seen Schu briefly talk to
 voters waiting in line waiting to vote. Once again Castro did not hear what was said.

Schu denied being present at the Pasco facility during the second polling period. Schu
 said that after the second pre-election conference, she left the Pasco facility at about 11:50 a.m.
 Schu's testimony was corroborated by Petitioner's organizers Shelby Mooney (Mooney) and
 Guadalupe Gamboa (Gamboa) and employees Maribel Saucedo (Saucedo) and Nora
 Montelongo (Montelongo). Both Schu and Mooney testified that after they left the Pasco facility
 they went to lunch in Kennewick, left the restaurant at about 1:25 p.m.¹ and returned to their
 hotel in Kennewick, a 15 minute drive from the Pasco facility. Mooney saw Schu enter her hotel
 room. Later at 3:05 p.m. Schu and Mooney returned together to the Pasco facility.

I credit the testimony of Schu, Mooney, Gamboa, Saucedo and Montelongo. Their
 testimony was consistent and supported by documentary evidence. Their testimony was
 specific, responsive and their demeanor did not display any hostility. On the other hand Castro
 displayed hostility and was frequently non-responsive. I had to admonish her several times to
 be responsive to the questions being asked by the parties. I found her testimony to be both
 evasive at times and exaggerated. I do not credit Castro.

Contrary to the Employer's assertion, employee Moises Dominguez testified that for
 about ten minutes during the polling period at the Pasco facility, he observed an unknown
 woman, not Schu² or an employee of Petitioner, tell employees waiting in line to vote, "Next."

The Board has held that the "final minutes before an employee casts his vote should be
 his own, as free from interference as possible." *Milchem, Inc.*, 170 NLRB 362 (1968). This rule
 applies to prolonged conversations between parties and voters waiting to vote. *Milchem, supra*.
 I find there is no credible evidence that an employee of Petitioner engaged in conversations with
 voters waiting to vote. To the extent that an employee for a brief period may have told voters
 waiting to vote that they were "next," this conduct did not so substantially impair the employees'
 exercise of free choice as to require that the election be set aside. *Hollingsworth Management
 Services*, 342 NLRB No. 50 (2004). I recommend that Employer's Objection 3 be overruled.

¹ Petitioner's Exhibit no. 1 is a receipt for lunch with the time of 1:07 PM indicated. Mooney
 testified that that was the time the bill was presented. Mooney said she and Schu stayed at the
 restaurant for a few minutes after receiving and paying the bill.

² At the hearing, the witness failed to identify Schu, who was present in the hearing room, as
 the woman saying "Next."

Conclusion

5 In the manner described fully above, I recommend that the Employer's Objections be
overruled.³

10 Dated, San Francisco, California, March 16, 2005.

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John J. McCarrick
Administrative Law Judge

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³ Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules
and Regulations, file exceptions to this report with the Board in Washington, D.C., within
fifteen (15) days from the issuance of this report and recommendations. Immediately upon
50 filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties
and shall file a copy with the Regional Director. If no party files exceptions thereto, the Board
may adopt the recommendations set forth herein.